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Supreme Court, U.S.
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No. 94-583

In The
Supreme Court Of The United States
October Term, 1994

JOHN YURCH,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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16 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment entitles a criminal defendant to appellate review in the state courts of a non-constitutional claim involving only issues of state law, which the defendant did not present or preserve for appellate review in the trial court, and which he did not present properly for appellate review.

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STATEMENT OF THE CASE

After a jury trial at which he did not testify, the petitioner was convicted of one misdemeanor count of offering to make home improvements without a current certificate of registration and three misdemeanor counts of making home improvements without a current certificate of registration in violation of Conn. Gen. Stat.

§ 20-427(b)(5).[1/] The trial court rendered a judgment of conviction.

The petitioner appealed from the judgment of conviction to the Connecticut Appellate Court. The sole issue raised by the petitioner on this appeal was his challenge to the trial court's "no adverse inference" instructions under Conn. Gen. Stat. § 54-84(b).[2/] See Appellant's Brief and Reply Brief. The Appellate Court found reversible error in the trial court's instructions, and ordered a new trial. State v. Yurch, 31 Conn. App. 688, 626 A.2d 1320 (1993). The Connecticut Supreme Court granted the respondent's petition for certification. The issues certified for review were limited to the petitioner's challenge to the trial court's "no adverse inference" instructions under the Connecticut statute. State v. Yurch, 227 Conn. 910, 632 A.2d 699 (1993). In a unanimous opinion, the Connecticut Supreme Court reversed the judgment of the Appellate Court and affirmed the judgment of the trial court. State v. Yurch, 229 Conn. 516, 641 A.2d 1387 (1994).

The petitioner filed Motions for Reconsideration and Reargument En Banc before the Connecticut Supreme Court based upon an entirely different claim than that upon which the appeal was decided. The

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1/ See State v. Yurch, 229 Conn. 516, 518 n. 2 (1994) (Petition For Writ of Certiorari at 3a) for the text of this statute.

2/ See State v. Yurch, 229 Conn. 516, 517 n. 1 (1994) (Petition For Writ of Certiorari at 2a) for the text of this statute.

petitioner argued that the requirements of the regulatory licensing statute which he was convicted of violating should be construed in a manner such that the petitioner's conduct did not violate these requirements. In opposition to these motions, the respondent argued that the petitioner failed to make or preserve this statutory construction claim for appeal in the trial court, and that he had not presented it in a proper manner for appellate review. Secondly, the respondent argued that the record is not adequate to allow review of this claim. Finally, the respondent argued that the petitioner's statutory construction claim is without merit. See State's Objection to Defendant's Motions For Reconsideration and Reargument. These motions were denied without opinion.

The petitioner's appeal of his conviction was based solely upon a challenge to the trial court's "no adverse inference" instructions. The petitioner did not raise or obtain a ruling on his statutory construction claim at trial. He did not request a jury instruction or object to the failure to give an instruction on this claim. Indeed, the petitioner presented no evidence and no theory of defense to the jury. State v. Yurch, 229 Conn. at 519.

The petitioner did not raise his statutory construction claim by way of any post trial motion, or in his brief or reply brief filed in the Appellate Court.

After oral argument had been scheduled in the Appellate Court, the petitioner filed a motion seeking

to amend his statement of issues and to brief this claim. The sole basis on which the defendant relied was invocation of the plain error rule, Connecticut Practice Book Section 4185.[3/] See Motion for Permission to Amend dated April 22, 1993 at 2. The petitioner made no claim that the federal constitution entitled him to review of this claim. The Appellate Court properly denied this motion.

The petitioner did not seek review, upon certification or otherwise, by the Connecticut Supreme Court of the Appellate Court's denial of this motion. The petitioner did not present his statutory construction claim as alternate grounds for affirmance in the certified appeal before the Connecticut Supreme Court, as required by Connecticut Practice Book Section 4140, in order to obtain review of this claim.[4/]

3/ "**[Conn. Practice Book] Sec. 4185 Errors Considered.** The court on appeal shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interest of justice notice plain error not brought to the attention of the trial court..."

4/ Practice Book Section 4140 provides, in relevant part, "(a) Upon the granting of certification, the appellee may present for review alternative grounds upon which the judgment may be affirmed provided those grounds were raised and briefed in the appellate court ... If such alternative grounds for affirmation ... were not raised in the appellate court, the party seeking to raise them in the supreme court must move for special permission to do so prior to the filing of that

(footnote cont'd)

Nevertheless, the petitioner raised his statutory construction claim in his brief before the Connecticut Supreme Court. See Appellee's brief at 8-15. In doing so, the petitioner relied exclusively upon a claim of plain error. He made no claim that the federal constitution entitled him to review of his unpreserved statutory construction claim. The respondent argued that the Connecticut Supreme Court should not consider this claim because the petitioner had failed to raise or preserve it for appeal in the trial court, and because the record was not adequate to allow review of this claim. See Appellant's Reply Brief at 10.

The petitioner made no attempt to present this claim during oral argument before the Connecticut Supreme Court. The Connecticut Supreme Court's opinion rested solely upon the certified issues presented in the case, and did not address the petitioner's statutory construction claim. That court then denied the petitioner's Motions for Reargument and Reconsideration. The Connecticut Supreme Court further denied the petitioner's Motion for Stay of Execution of his sentence.

(footnote cont'd from previous page)

> party's brief. Such permission will be granted only in exceptional cases where the interests of justice so require ... (c) Any party desiring to present alternative grounds for affirmance ... shall file a statement thereof within fourteen days from the issuance of notice of certification."

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

I. THE PETITIONER HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

The petitioner claims that the Connecticut Supreme Court's failure to decide his statutory construction claim violated the petitioner's due process rights under the Fourteenth Amendment.

The petitioner's claim is that the Due Process Clause entitles him to appellate review in the state courts of a non-constitutional claim involving only issues of state law, which he did not present or preserve for appellate review in the trial court, and which he did not present properly for appellate review. This claim raises no substantial federal question.

The petitioner has not claimed that the statute which he was convicted of violating is unconstitutional. He has not claimed that resolution of his statutory construction claim involves interpretation or application of any federal law. He claims only that the underlying statute should be construed so that it does not apply to his conduct. Thus, the petitioner's statutory construction claim is non-constitutional, and one purely of state law. The Connecticut Supreme Court has consistently held that it is not bound to review on appeal unpreserved, non-constitutional claims. State v. Kulmac, 230 Conn. 43, 74, 644 A.2d 887 (1994).

Moreover, the petitioner did not claim before the Connecticut Supreme Court that the Due Process Clause entitles him to appellate review of his unpreserved statutory construction claim. He did not claim that his statutory construction argument was entitled to review under State v. Golding, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), which allows for appellate review of unpreserved claims involving clear violation of fundamental constitutional rights in limited circumstances. His claim for appellate review of his statutory construction claim was based solely upon the plain error rule under Connecticut Practice Book Section 4185. See Appellee's Brief at 8-15. Likewise, the petitioner's Motions for Reconsideration and Reargument were based upon his claim that "plain error and the interests of justice" required review. See Motion for Reconsideration at 3.

Thus, the petitioner never presented a federal question in the state court proceedings. In order to invoke the jurisdiction of this Court, it is essential that the federal question be raised, presented, and pursued in a timely and proper manner at the appropriate points in the state court proceedings. Hill v. California, 401 U.S. 797, 805 (1971). Here, the purported federal claim was neither raised in, nor considered and resolved by the state courts.

Even had the petitioner claimed, contrary to the facts, that he did raise the purported federal issue on his Motions for Reconsideration and Reargument, this

Court should not assert jurisdiction. See Exxon Corp. v Eagerton, 462 U.S. 176, 181 n.3 (1983) (where the general practice of the state's appellate courts was not to consider issues raised for the first time on appeal, jurisdiction was lacking over a federal claim raised for the first time on appeal); Bailey v. Anderson, 326 U.S. 206-07 (1945) (where a federal question is initially raised in the highest state court, and the record does not show that the state court has passed upon any constitutional question not raised or passed upon in the proceedings below, the jurisdiction of the Supreme Court cannot attach); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945) (raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the federal question.) Clearly then, the Connecticut Supreme Court's failure to consider an issue of state law raised for the first time on appeal cannot raise a substantial federal question.

In order to invoke the jurisdiction of this Court, the federal question must be more than a formal claim. It must not be so absolutely devoid of merit as to be frivolous. Zucht v. King, 260 U.S. 174 (1922); Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390 (1952). The defendant's claim fails to present even a colorable argument to invoke jurisdiction of the United States Supreme Court.

II. IMPORTANT QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The respondent disputes the petitioner's entire legal analysis of the underlying statute, including his claim that this statute "does not make it unlawful for a contractor who has made application for renewal of his certificate of registration within a month or exactly one month after the expiration date to continue to offer to make or to make home improvements." Petition For Writ of Certiorari at 6.

However, even if this Court accepts the petitioner's invitation to construe the Connecticut statute, the petitioner cannot show that the Connecticut Supreme Court violated his due process rights without requiring this Court to make findings of fact based upon a review of the evidence presented in the trial court. The petitioner's statutory construction claim is premised upon his assumption of the existence of certain facts regarding the petitioner's application for renewal of his certificate of registration, including that he applied for renewal of his certificate within a certain time period, which the evidence does not support and on which the defendant requested no jury instructions.

For example, the petitioner argues that his registration did not expire more than one month before his application for renewal was made. However, the record shows that the petitioner's registration expired May 1, 1990 and his renewal application was received by the Department of Consumer Protection on June 1, 1990.

This application was legally insufficient. The required fee, as stated on the face of the renewal application, was $160, plus a $20 late fee pursuant to Conn. Gen. Stat. § 20-427(f). The petitioner submitted $120 with his renewal application. The Commissioner did not act upon this application because it was incomplete, and sent the petitioner a letter on June 8, 1990 informing him that his renewal had not been issued. (T. 3-25-92 [direct examination of Martinchek] pp. 16-19; 24-26].

This Court should deny the Petition because of the necessity to make findings of fact. "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Furthermore, because the petitioner offered no evidence at trial to support a theory of defense based upon his statutory construction argument, and requested no jury instructions on this defense, the record is not adequate to allow review of the defendant's claim by the Connecticut Supreme Court or by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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